

Federal Communications Commission

§ 1.9030

subject to the same rules and procedures regarding *pro forma* transactions applicable to licensees set forth in §1.948(c)(1) of subpart F of this part. The Commission will place information concerning a notification related to a transfer of control, whether substantial or *pro forma*, on public notice.

(j) *Revocation or automatic cancellation of a license or a spectrum lessee's operating authority.* (1) In the event an authorization held by a licensee that has entered into a spectrum leasing arrangement is revoked or cancelled, the spectrum lessee will be required to terminate its operations no later than the date on which the licensee ceases to have any authority to operate under the license, except as provided in paragraph (j)(2) of this section.

(2) In the event of a license revocation or cancellation, the Commission will consider a request by the spectrum lessee for special temporary authority (see §1.931 of subpart F of this part) to provide the spectrum lessee with an opportunity to transition its users in order to minimize service disruption to business and other activities.

(3) In the event of a license revocation or cancellation, and the required termination of the spectrum lessee's operations, the former spectrum lessee does not, as a result of its former status, receive any preference over any other party should the spectrum lessee seek to obtain the revoked or cancelled license.

(k) *Subleasing.* A spectrum lessee may sublease the leased spectrum usage rights subject to the licensee's consent and the licensee's establishment of privity with the spectrum sublessee. The licensee must submit a notification regarding the spectrum subleasing arrangement in accordance with the notification procedures set forth in this section.

(l) *Renewal.* A licensee and spectrum lessee that have entered into a spectrum leasing arrangement whose term continues to the end of the current term of the license authorization may, contingent on the Commission's grant of the license renewal, extend the spectrum leasing arrangement during the term of the renewed license authorization. The licensee must notify the Commission of such an extension of the

spectrum leasing arrangement on the same application it submits for license renewal (see §1.949 of subpart F of this part).

EFFECTIVE DATE NOTE: At 68 FR 66277, Nov. 25, 2003, §1.9020 was added. Paragraph (e) of this section contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

§ 1.9030 Long-term de facto transfer leasing arrangements.

(a) *Overview.* Under the provisions of this section, a licensee (in any of the included services) and a spectrum lessee may enter into a long-term *de facto* transfer leasing arrangement in which the licensee retains *de jure* control of the license while *de facto* control of the leased spectrum is transferred to the spectrum lessee for the duration of the spectrum leasing arrangement, subject to prior Commission consent pursuant to the application procedures set forth in this section. A "long-term" *de facto* transfer leasing arrangement has an individual term, or series of combined terms, of more than 360 days.

(b) *Rights and responsibilities of the licensee.* (1) Except as provided in paragraph (b)(2) of this section, the licensee is relieved of primary and direct responsibility for ensuring that the spectrum lessee's operations comply with the Communications Act and Commission policies and rules.

(2) The licensee is responsible for its own violations, including those related to its spectrum leasing arrangement with the spectrum lessee, and for ongoing violations or other egregious behavior on the part of the spectrum lessee about which the licensee has knowledge or should have knowledge.

(3) The licensee must retain a copy of the spectrum leasing agreement and make it available upon request by the Commission.

(c) *Rights and responsibilities of the spectrum lessee.* (1) The spectrum lessee assumes primary responsibility for complying with the Communications Act and applicable Commission policies and rules.

(2) The spectrum lessee is granted an instrument of authorization pertaining

to the *de facto* transfer leasing arrangement that brings it within the scope of the Commission's direct forfeiture provisions under section 503(b) of the Communications Act.

(3) The spectrum lessee is responsible for interacting with the Commission regarding the leased spectrum and for making all related filings (*e.g.*, all applications and notifications, submissions of any materials required to support a required Environmental Assessment, any reports required by Commission rules and applicable to the lessee, information necessary to facilitate international or Interdepartment Radio Advisory Committee (IRAC) coordination).

(4) The spectrum lessee is required to maintain accurate information on file pursuant to Commission rules (*see* § 1.65 of subpart A of this part).

(5) The spectrum lessee must retain a copy of the spectrum leasing agreement and make it available upon request by the Commission.

(d) *Applicability of particular service rules and policies.* Under a long-term *de facto* transfer leasing arrangement, the service rules and policies apply in the following manner to the licensee and spectrum lessee:

(1) *Interference-related rules.* The interference and radiofrequency (RF) safety rules applicable to use of the spectrum by the licensee as a condition of its license authorization also apply to the use of the spectrum leased by the spectrum lessee.

(2) *General eligibility rules.* (i) The spectrum lessee must meet the same eligibility and qualification requirements that are applicable to the licensee under its license authorization.

(ii) The spectrum lessee must meet applicable foreign ownership eligibility requirements (*see* sections 310(a), 310(b) of the Communications Act).

(iii) The spectrum lessee must satisfy any qualification requirements, including character qualifications, applicable to the licensee under its license authorization.

(iv) The spectrum lessee must not be a person subject to denial of Federal benefits under the Anti-Drug Abuse Act of 1988 (*see* § 1.2001 *et seq.* of subpart P of this part).

(3) *Use restrictions.* To the extent that the licensee is restricted from using the licensed spectrum to offer particular services under its license authorization, the use restrictions apply to the spectrum lessee as well.

(4) *Designated entity/entrepreneur rules.* (i) A licensee that holds a license pursuant to small business and/or entrepreneur provisions (*see* § 1.2110 of subpart Q of this part and § 24.709 of this chapter) and continues to be subject to unjust enrichment requirements (*see* § 1.2111 of subpart Q of this part and § 24.714 of this chapter) and/or transfer restrictions (*see* § 24.839 of this chapter) may enter into a long-term *de facto* transfer leasing arrangement with any entity under the streamlined processing procedures described in this section, subject to any applicable unjust enrichment payment obligations and/or transfer restrictions (*see* § 1.2111 of subpart Q of this part and § 24.839 of this chapter).

(ii) A licensee holding a license won in closed bidding (*see* § 24.709 of this chapter) may, during the first five years of the license term, enter into a spectrum leasing arrangement with an entity not eligible to hold such a license pursuant to the requirements of § 24.709(a) of this chapter so long as it has met its five-year construction requirement (*see* §§ 24.203, 24.839(a)(6) of this chapter).

(iii) The amount of any unjust enrichment payment will be determined by the Commission as part of its review of the application under the same rules that apply in the context of a license assignment or transfer of control (*see* § 1.2111 of subpart Q of this part and § 24.714 of this chapter). If the spectrum leasing arrangement involves only part of the license area and/or part of the bandwidth covered by the license, the unjust enrichment obligation will be apportioned as though the license were being partitioned and/or disaggregated (*see* § 1.2111(e) of subpart Q of this part and § 24.714(c) of this chapter). A licensee will receive no reduction in its unjust enrichment payment obligation for a spectrum leasing arrangement that ends prior to the end of the fifth year of the license term.

(iv) A licensee that participates in the Commission's installment payment

program (see §1.2110(g) of subpart Q of this part) may enter into a long-term *de facto* transfer leasing arrangement without triggering unjust enrichment obligations provided that the lessee would qualify for as favorable a category of installment payments. A licensee using installment payment financing that seeks to lease to an entity not meeting the eligibility standards for as favorable a category of installment payments must make full payment of the remaining unpaid principal and any unpaid interest accrued through the effective date of the spectrum leasing arrangement (see §1.2111(c) of subpart Q of this part). This requirement applies regardless of whether the licensee is leasing all or a portion of its bandwidth and/or license area.

(5) *Construction/performance requirements.* Any performance or build-out requirement applicable under a license authorization (e.g., a requirement that the licensee construct and operate one or more specific facilities, cover a certain percentage of geographic area, cover a certain percentage of population, or provide substantial service) always remains a condition of the license, and the legal responsibility for meeting such obligation is not delegable to the spectrum lessee(s).

(i) The licensee may attribute to itself the build-out or performance activities of its spectrum lessee(s) for purposes of complying with any applicable build-out or performance requirement.

(ii) If a licensee relies on the activities of a spectrum lessee to meet the licensee's performance or build-out obligation, and the spectrum lessee fails to engage in those activities, the Commission will enforce the applicable performance or build-out requirements against the licensee, consistent with the applicable rules.

(iii) If there are rules applicable to the license concerning the discontinuance of operation, the licensee is accountable for any such discontinuance and the rules will be enforced against the licensee regardless of whether the licensee was relying on the activities of a lessee to meet particular performance requirements.

(6) *Cellular cross-interest rule.* The cellular cross-interest rule applies to spectrum leasing arrangements involving a cellular authorization in a Rural Service Area (RSA), and leased cellular spectrum is attributable to the spectrum lessee pursuant to §22.942 of this chapter (see §§22.942, 22.909 of this chapter).

(7) *Regulatory classification.* If the regulatory status of the licensee (e.g., common carrier or non-common carrier status) is prescribed by rule, the regulatory status of the spectrum lessee is prescribed in the same manner, except that §20.9(a) of this chapter shall not preclude a licensee in the services covered by that rule from entering into a spectrum leasing arrangement with a spectrum lessee that chooses to operate on a PMRS, private, or non-commercial basis.

(8) *Regulatory fees.* The licensee remains responsible for payment of the required regulatory fees that must be paid in advance of its license term (see §1.1152 of subpart G of this part). Where, however, regulatory fees are paid annually on a per-unit basis (such as for CMRS services pursuant to §1.1152 of subpart G of this part), the licensee and spectrum lessee each are required to pay fees for those units associated with its respective operations.

(9) *E911 requirements.* To the extent the licensee is required to meet E911 obligations (see §20.18 of this chapter), the spectrum lessee is required to meet those obligations with respect to the spectrum leased under the spectrum leasing arrangement insofar as the spectrum lessee's operations are encompassed with the E911 obligations.

(e) *Spectrum leasing application.* Parties entering into a long-term *de facto* transfer leasing arrangement are required to file an electronic application with the Commission, using FCC Form 603, and obtain Commission consent prior to consummating the transfer of *de facto* control of the leased spectrum, except that parties falling within the provisions of §1.911(d) of subpart F of this part may file the notification either electronically or manually.

(1) *Application fees.* The spectrum leasing application will be treated as a transfer of control for purposes of determining the applicable application

fees as set forth in § 1.1102 of subpart G of this part.

(2) *Streamlined approval procedures.* (i) The spectrum leasing application will be placed on public notice once the application is sufficiently complete and accepted for filing (see § 1.933 of subpart F of this part).

(ii) Petitions to deny filed in accordance with section 309(d) of the Communications Act must comply with the provisions of § 1.939 of subpart F of this part except that such petitions must be filed no later than 14 days following the date of the public notice listing the application as accepted for filing.

(iii) No later than 21 days following the date of the public notice listing an application as accepted for filing, the Wireless Telecommunications Bureau (Bureau) will affirmatively consent to the application, deny the application, or remove the application from streamlined processing for further review. For applications for which no prior public notice is required, the Bureau will affirmatively consent to the application, deny the application, or remove the application from streamlined processing for further review no later than 21 days following the date on which the application has been filed and any required application fee has been paid (see § 1.1102 of subpart G of this part).

(iv) Grant of consent to the application will be reflected in a Public Notice (see § 1.933(a)(2) of subpart F of this part) promptly issued after the grant.

(v) If the Bureau determines to remove an application from streamlined processing, it will issue a public notice indicating that the application has been removed from streamlined processing. Within 90 days of that public notice, the Bureau will either take action upon the application or provide public notice that an additional 90-day period for review is needed.

(vi) Consent to an application is not deemed granted until the Bureau affirmatively acts upon the application.

(vii) If any petition to deny is filed and the Bureau grants the application, the Bureau will deny the petition(s) and issue a concise statement of the reason(s) for denial, disposing of all substantive issues raised in the petition(s).

(3) *Public notice of application.* Applications under this subpart will be placed on an informational public notice on a weekly basis (see § 1.933(a) of subpart F of this part).

(4) *Contents of the application.* The application must contain all information requested on the applicable form, FCC Form 603, and any additional information and certifications required by the rules in this chapter and any rules pertaining to the specific service for which the application is filed.

(5) *Effective date of a de facto transfer leasing arrangement.* If the Commission consents to the *de facto* transfer leasing arrangement, the *de facto* transfer leasing arrangement will be deemed effective in the Commission's records, and for purposes of the application of the rules set forth in this section on the date set forth in the application. If the Commission consents to the arrangement after that specified date, the spectrum leasing application will become effective on the date of the Commission affirmative consent.

(f) *Expiration, extension, or termination of spectrum leasing arrangement.* (1) Except as provided in paragraph (f)(2) or (f)(3) of this section, a spectrum leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the application. The Commission's consent to the *de facto* transfer leasing application includes consent to return the leased spectrum to the licensee at the end of the term of the spectrum leasing arrangement.

(2) A spectrum leasing arrangement may be extended beyond the initial term set forth in the spectrum leasing application pursuant to the application procedures set forth in § 1.9030(e). Where there is pending before the Commission at the date of termination of the spectrum leasing arrangement a proper and timely application seeking to extend the arrangement, the parties may continue to operate under the original spectrum leasing arrangement without further action by the Commission until such time as the Commission shall make a final determination with respect to the application.

(3) If a spectrum leasing arrangement is terminated earlier than the termination date set forth in the notification, either by the licensee or by the parties' mutual agreement, the licensee must file a notification with the Commission, no later than ten (10) days after the early termination, indicating the date of the termination. If the parties fail to put the spectrum leasing arrangement into effect, they must so notify the Commission consistent with the provisions of this section.

(4) The Commission will place information concerning an extension or an early termination of a spectrum leasing arrangement on public notice.

(g) *Assignment of spectrum leasing arrangement.* The spectrum lessee may assign its lease to another entity provided that the licensee has agreed to such an assignment, there is privity between the licensee and the assignee, and the assignment of the spectrum lessee is approved by the Commission pursuant to the same application and approval procedures set forth in this section. In the case of a *pro forma* assignment, the parties involved in the *pro forma* transaction may file the notification regarding the action subject to the rules and procedures regarding *pro forma* transactions applicable to licensees set forth in § 1.948(c)(1) of subpart F of this part. The Commission will place information concerning the notification relating to an assignment, whether substantial or *pro forma*, on public notice.

(h) *Transfer of control of spectrum lessee.* A spectrum lessee contemplating a transfer of control must obtain Commission consent using the same application and Commission consent procedures set forth in this section. In the case of a *pro forma* transfer of control of the spectrum lessee, the parties involved in the *pro forma* transaction may file the notification regarding the action subject to the rules and procedures regarding *pro forma* transactions applicable to licensees set forth in § 1.948(c)(1) of subpart F of this part. The Commission will place information concerning the notification relating to a transfer of control, whether substantial or *pro forma*, on public notice.

(i) *Revocation or automatic cancellation of a license or the spectrum lessee's oper-*

ating authority. (1) In the event an authorization held by a licensee that has entered into a spectrum leasing arrangement is revoked or cancelled, the spectrum lessee will be required to terminate its operations no later than the date on which the licensee ceases to have authority to operate under the license, except as provided in paragraph (i)(2) of this section.

(2) In the event of a license revocation or cancellation, the Commission will consider a request by the spectrum lessee for special temporary authority (see § 1.931 of subpart F of this part) to provide the spectrum lessee with an opportunity to transition its users in order to minimize service disruption to business and other activities.

(3) In the event of a license revocation or cancellation, and the required termination of the spectrum lessee's operations, the former spectrum lessee does not, as a result of its former status, receive any preference over any other party should the spectrum lessee seek to obtain the revoked or cancelled license.

(j) *Subleasing.* A spectrum lessee may sublease spectrum usage rights subject to the following conditions. Parties entering into a spectrum subleasing arrangement are required to comply with the Commission's rules for obtaining approval for spectrum leasing arrangements provided in this subpart and are governed by those same policies. The application filed by parties to a spectrum subleasing arrangement must include written consent from the licensee to the proposed arrangement. Once a spectrum subleasing arrangement has been approved by the Commission, the sublessee becomes the party primarily responsible for compliance with Commission rules and policies.

(k) *Renewal.* A licensee and spectrum lessee that have entered into a spectrum leasing arrangement whose term continues to the end of the current term of the license authorization may, contingent on the Commission's grant of the license renewal, extend the spectrum leasing arrangement during the term of the renewed license authorization. The licensee must notify the Commission of such an extension of the spectrum leasing arrangement on the same application it submits for license

renewal (see § 1.949 of subpart F of this part). The spectrum lessee may operate under the extended term, without further action by the Commission, until such time as the Commission shall make a final determination with respect to the extension of the spectrum leasing arrangement.

EFFECTIVE DATE NOTE: At 68 FR 66277, Nov. 25, 2003, § 1.9030 was added. Paragraph (e) of this section contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

§ 1.9035 Short-term *de facto* transfer leasing arrangements.

(a) *Overview.* Under the provisions of this section, a licensee (in any of the included services) and a spectrum lessee may enter into a short-term *de facto* transfer leasing arrangement in which the licensee retains *de jure* control of the license while *de facto* control of the leased spectrum is transferred to the spectrum lessee for the duration of the spectrum leasing arrangement, subject to prior Commission consent pursuant to the application procedures set forth in this section. A “short-term” *de facto* transfer leasing arrangement has an individual or combined term of not longer than 360 days.

(b) *Rights and responsibilities of licensee.* The rights and responsibilities applicable to a licensee that enters into a short-term *de facto* transfer leasing arrangement are the same as those applicable to a licensee that enters into a long-term *de facto* transfer leasing arrangement, as set forth in § 1.9030(b).

(c) *Rights and responsibilities of spectrum lessee.* The rights and responsibilities applicable to a spectrum lessee that enters into a short-term *de facto* transfer leasing arrangement are the same as those applicable to a spectrum lessee that enters into a long-term *de facto* transfer leasing arrangement, as set forth in § 1.9030(c).

(d) *Applicability of particular service rules and policies.* Under a short-term *de facto* leasing arrangement, the service rules and policies apply to the licensee and spectrum lessee in the same manner as under long-term *de facto* transfer

leasing arrangements (see § 1.9030(d)), except as provided herein:

(1) *Use restrictions and regulatory classification.* Use restrictions applicable to the licensee also apply to the spectrum lessee except that § 20.9(a) of this chapter shall not preclude a licensee in the services covered by that rule from entering into a spectrum leasing arrangement with a spectrum lessee that chooses to operate on a PMRS, private, or non-commercial basis, and except that a licensee with an authorization that restricts use of spectrum to non-commercial uses may enter into a short-term *de facto* transfer leasing arrangement that allows the spectrum lessee to use the spectrum commercially.

(2) *Designated entity/entrepreneur rules.* Unjust enrichment provisions (see § 1.2111 of subpart Q of this part) and transfer restrictions (see § 24.839 of this chapter) do not apply with regard to a short-term *de facto* transfer leasing arrangement.

(3) *Construction/performance requirements.* The licensee is not permitted to attribute to itself the activities of its spectrum lessee when seeking to establish that performance or build-out requirements applicable to the licensee have been met.

(4) *Cellular cross-interest rule and policies.* The cellular cross-interest rule and policies (see § 22.942 of this chapter) do not apply with regard to short-term *de facto* transfer leasing arrangements.

(5) *E911 requirements.* If E911 obligations apply to the licensee (see § 20.18 of this chapter), the licensee retains the obligations with respect to leased spectrum. A spectrum lessee entering into a short-term *de facto* transfer leasing arrangement is not separately required to comply with any such obligations in relation to the leased spectrum.

(e) *Spectrum leasing application.* Parties entering into a short-term *de facto* transfer leasing arrangement are required to file an electronic application with the Commission, using FCC Form 603, and obtain Commission consent prior to consummating the transfer of *de facto* control of the leased spectrum, except that parties falling within the provisions of § 1.911 of subpart F of this part may file the application either